Supreme Court, U. S.
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In the Supreme Court of the United States

CASE NO: 76-1319

BURLEIGH HOUSE CONDOMINIUM, INC.,
a non-profit Florida corporation on behalf of
itself and its membership,

Petitioner,

vs.

Herbert Buchwald, individually and as trustee, and
BURLEIGH HOUSE, INC., a Florida
corporation for profit,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CASE NO: _____

BURLEIGH HOUSE CONDOMINIUM, INC.,
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Herbert Buchwald, individually and as trustee, and
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corporation for profit,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Burleigh House Condominium, Inc., a non-profit Florida condominium corporation, on behalf of itself and its members-unit owners, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 26, 1977, reported at __ F.2d __ (5th Cir. 1977), reh. den. February 24, 1977.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at __ F.2d __ (5th Cir. 1977). The opinion of the United States District Court for the Southern District of Florida appears at __ F.Supp. __ (U.S.D.C. So. Fla. 1976).

JURISDICTION

The judgment of the Court of Appeals (App. 1) was entered on January 26, 1977. A timely Petition for Rehearing was denied on February 24, 1977 (App. 2). This Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

Section 15 of the Sherman Act (15 U.S.C. 15) provides in part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any District Court of the United States in the District in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained . . . "

Section 26 of the Sherman Act (15 U.S.C. 26) provides in part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including Sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . "

Section 2201 of the Declaratory Judgment Act (28 U.S.C. 2201) provides in part:

> "In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought . . . "

Section 1 of the Sherman Act (15 U.S.C. 1) provides in part:

> "Every contract . . . in restraint of trade or commerce among the several states . . . is declared to be illegal . . . "

Section 2 of the Sherman Act (15 U.S.C. 2) provides in part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or the commerce among the several states . . . "

QUESTIONS PRESENTED

I. Can a United States Court of Appeals, sua sponte, order a case remanded for dismissal, solely on the issue of standing, based upon bringing of an action by an improper party, without the opportunity for proper parties to be substituted?

II. Does a non-profit Condominium corporation, have standing to bring an action based upon the antitrust laws of the United States if it is injured in its business or property by reason of anything forbidden in the antitrust laws of the United States?

STATEMENT

Burleigh House Condominium, Inc., is a non-profit Florida condominium corporation which operates a large condominium complex in Dade County, Florida. Burleigh House contains more than 350 individual dwelling units, commercial stores, offices, recreational facilities (pursuant to a 99 year escalating lease contract) and other on-site supportive facilities necessary for the operation and maintenance of a community of approximately 700 persons. Its residents are both permanent and transient, many residing in other states for a portion of the year.

It is concededly similar in its operation to a myriad of other condominiums throughout Florida and the several states and, particularly, to Buckley Towers Condominium (*Buckley Towers Condominium, Inc. vs. Buchwald*, 533

F.2d 934 (5th Cir. 1976). As in *Buckley, supra*, tied contracts of staggering length were imposed upon the condominium association (guaranteed by the individual members of the Condominium Association), among them a management contract and a 99 year lease agreement. The 99 year lease agreement is a mandatory contract imposed upon Petitioner by Respondents in this cause in the same manner as other long term lease contracts are imposed on other condominiums in the State of Florida. The cost to Petitioner for the tied facilities imposed by the contract is hugely in excess of the actual value of the tied facilities when measured by any conceivable standard and increases periodically in accordance with the consumer price index. The tied product is unwanted.

Burleigh House was one of the early antitrust cases filed in the United States District Court for the Southern District of Florida by Condominium Associations. The suit was filed on behalf of itself and in a representative capacity on behalf of its membership. No individual unit owners were named, served or involved as parties.

Defendants filed motions to dismiss for various reasons, including the defense of lack of standing, alleging that the Condominium Association was not a "person injured in its business or property". The Motion to Dismiss was denied, the Court finding from the evidence that the Condominium Association met the test for standing, was a proper party to bring the action, had demonstrated injury, and the joinder of individual unit owners was not required.

In that posture the case proceeded to trial and at the conclusion of the presentation of Petitioner's case, the

Court granted a Motion for directed verdict, on grounds *other* than standing, and dismissed the cause, (App. 3).

An appeal was timely filed and prosecuted but, after oral argument, the appellate court, relying solely on *Buckley Towers, supra*, sua sponte, remanded the case to the District Court for dismissal on the basis of lack of standing, and declined to review the other points on appeal. Defendants had not raised the standing issue on appeal, nor did they file a cross-appeal.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals, in its Order of remand for dismissal, should have permitted an opportunity for the substitution or joinder of those parties whom, in the view of the Court of Appeals, should be the proper parties.

2. The Court erred in denying Petitioner standing to proceed in the cause, *sua sponte*.

ARGUMENT

THE SUBSTITUTION OF PARTIES QUESTION

Rule 17(a), Fed. R.C.P. forbids the dismissal of an action on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed *after objection* for ratification or commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action

had been commenced in the name of the real party in interest. See also: *Costello vs. United States*, 365 U.S. 265, 81 S.Ct. 534, 5 L.Ed.2d 551 (1961).

Thus, the remand by the Court of Appeals solely for entry of an Order of dismissal for lack of standing, is not necessarily the proper or appropriate course to be followed in this case. See: *Executive Jet Aviation, Inc., et al., vs. United States of America*, 507 F.2d 508 (6th Cir. 1974), at 514, *citing Rule 17(a)*.

In the instant case, the District Court proceeded to trial after finding that Petitioner was the proper party to bring the action and specifically ruled that Petitioner had standing to do so.

Burleigh House was also the first of a number of similar type cases filed in the District Court to go to trial. However, *Buckley* was *decided* first by the 5th Circuit.

In relying solely upon *Buckley, supra*, for its *sua sponte* remand for dismissal, the 5th Circuit apparently did not take into consideration the fact that *Burleigh* differed from *Buckley*, since an additional class action had been initiated by an individual unit owner at the Buckley Towers Condominium, *Buckley, supra at 939*, prior to the 5th Circuit decision.

> " . . . we hold that the District Court did not abuse its discretion in denying the Appellant's Motion to Amend its Complaint and add or join parties plaintiff, in light of the commencement of a second action alleging substantially the same claims brought by the Appellant and by

an individual condominium unit owner on behalf of all residential unit owners at the Buckley Towers Condominium." *Ignatz Spitz, etc., et al., vs. Herbert Buchwald, etc., et al.*, S. D. Fla. 75-1549-Civ-JLK-Cf, *Miller vs. Granados*, 5 Cir. 1976, 529 F.2d 393.

The District Court also dismissed the individual action. Thus, *Buckley* differs significantly from *Burleigh House* and it would appear that the decision of the Fifth Circuit in *Burleigh House* should be modified so as to permit joinder or substitution of the "real parties in interest" and the appropriate tolling of any period of limitations which might otherwise apply. *State of Utah, et al., vs. American Pipe and Construction Company, et al., etc.*, 473 F.2d 580 (9th Cir. 1973) and *American Pipe and Construction Co., etc., et al., vs. Utah, etc., et al.*, 1974, 94 Supreme Court 756, 414 U.S. 538, 38 L.Ed.2d 713, reh. den. 94 S.Ct. 1477, 415 U.S. 952, 39 L.Ed.2d 568, in order to avoid further technical impediments to the action and further appeals.

THE STANDING ISSUE

Petitioner incorporates by reference the recent briefs in support of certiorari and for rehearing filed in *Buckley Towers Condominium, Inc. vs. Herbert Buchwald, et al.*, __ S.Ct. __ (1977), Case No. 76-636, and would add thereto additional arguments.

> "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue

> or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which a district court is held . . . " Rule 17 (b) Fed. R.C.P.

The law of the State of Florida prevailing at the time of the bringing of the instant action in the United States District Court and at this time permits a condominium corporation to sue or be sued in its own name on behalf of itself and as sole representative of its membership. Petitioner set forth its statutory authority and capacity to sue in its complaint. (App. 4)

Circuits other than the Fifth Circuit have followed this doctrine in antitrust cases. *D'ippolito vs. Cities Service Company*, 374 F.2d 643 (2nd Cir. 1967, at *647-648*.

See also: the 2nd Circuit case of *Joseph Mueller Corporation Zurich vs. Societe Anonyme de Gerante, et al.*, 451 F.2d 727 2nd Cir. 1971), an antitrust action in which the Court interpreted Rule 17 (b) and recognized the general capacity of a *corporation* to sue or be sued in a representative action, if permitted by State law.

The Court held that ". . . the capacity of a corporation to sue or be sued shall be determined by the law under which it was organized . . .", *at 728*.

Thus, the foregoing representative cases appear to differ irreconcilably with the position taken by the Fifth Circuit in *Burleigh* and *Buckley, supra* and have presented a conflict between the circuits which should be resolved by a decision from this Court. It appears only the Fifth

Circuit has ruled specifically upon the question of a *condominium corporation's* standing to sue for violation of the antitrust laws, as opposed to any other type corporate entity, whether for profit or non-profit, although non-profit corporate entities have been permitted standing in other circuits in various cases. *Warth vs. Seldon*, 1975, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343.

The Fifth Circuit's denial of standing in *Buckley Towers, supra*, might arguably be justified by the recitation in that opinion that a parallel case was before that Court. Possibly the majority of this Court was of the opinion that judicial economy would best be served by denying certiorari in light of the particular facts of the case. However, in *this* case there is no parallel action pending in any Court and reasons of judicial economy are absent, (nor should there be any sacrifice of the enforcement of the antitrust laws in favor of considerations of judicial economy, in any event. *In re Western Liquid Asphalt Cases*, 487 F.2d 191 9th Cir. 1973, cert. den. 94 S.Ct. 1419 (1974), *at 199.*)

Since such considerations are absent in the instant case, and there being no ancillary or companion proceedings in *Burleigh*, and should the Court choose to do so, there would be no barrier to the full consideration of the *standing issue* in this case in order that a definitive statement can be made to unsnarl the technical entanglements which have stopped the progress of many similar cases in the Courts below.

Standing is an amorphous and difficult concept to grasp. Decisions on the issue differ from circuit to circuit, district to district and even within the divisions of a given

district. The instant case is one on point. Different divisions of the United States District Court for the Southern District of Florida came to different conclusions on the issue of standing in cases of this type.

Petitioner presents the view espoused in *Association of Data Processing Service Org., Inc., v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2nd 1814 (1970):

> "Generalizations about standing to sue are largely worthless as such. One generalization is, however, necessary and that is that the question of standing in the Federal Courts is to be considered in the framework of Article III which restricts judicial power to "cases" and "controversies". As we recently stated in *Flast v. Cohen*, 392 U.S. 83, 101, 88 S.Ct. 1942, 1953, 20 L.Ed.2d 947, "in terms of Article III Limitations on Federal Court Jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."

Basically, the issue of standing delegates itself to whether or not there is any "legal interest" which can give rise to the action brought by a Plaintiff. This interest may be the invasion of a legal right, one of property, one arising out of contracts, one protected against torturous invasion, or one founded on a statute which confers a privilege. *Association of Data Processing Service Org., supra at 830.*

The legal interest test also goes to the merits. The question may involve still more. Apart from the "case" or

"controversy" test, whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question . . . that interest, at times, may reflect "aesthetic, conservational, and recreational" as well as economic values . . . standing may arise from non-economic values as well as from economic injury. Certainly he who is "likely to be financially" injured . . . may be a reliable private attorney general to litigate the issues of the public interest . . . ", *Association of Data Processing Service Org., Inc., supra at 830.*

In the instant case, Petitioner is a party to the "illegal contract" complained of and has alleged personal damage as well as injury to its membership. (App. 4)

In the annals of contract law, it would be difficult to envision or construct a contract more onerous to a lessee and competition than the one in the instant case. Other condominium associations are subjected to the same onerous contracts. Millions upon millions of dollars are involved and the cumulative adverse effect upon competition is staggering.

Petitioner in this case is the unwilling lessee to one of these onerous contracts. The continual imposition and enforcement of the contract gives rise to provable damages. It is difficult to understand why trials on the merits of the antitrust violations asserted can be denied Petitioner and others like it on the technical issue of *standing* alone.

The decision in the Fifth Circuit has placed Petitioner in the unique position in antitrust law of being an acceptable defendant, but never a plaintiff. Though damages

may be and have been obtained from Petitioner in its capacity as a *party* to the contract complained of, Petitioner cannot counterclaim or sue separately for its damages.

Although injunctions may issue against Plaintiff which stay both Plaintiff and its membership, Petitioner may not obtain injunctive relief either on behalf of itself or on behalf of its membership.

If this Court upholds the right of a non-profit entity to be a *defendant* in an antitrust suit, why cannot a non-profit corporation be a *plaintiff*. *Hospital Building Company vs. Trustees of Rex Hospital*, ——— U. S. ———, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976).

If per se violations of the antitrust laws of the pernicious and all-pervading type present in this case can go unchallenged solely because the only party capable of bringing and maintaining the action is estopped due to technical reasons of standing, then the housing industries of this country are granted an implied license to end the concept of private housing as we have known it in this country over the years. Industry, unfortunately is prone to take advantage of any device which will net additional revenue without the necessity of any expenditures or investment. If unwanted, long-term mandatory contracts can be imposed upon condominium associations and its membership at prices hugely in excess of any investment required to produce such return, then these contracts will continue to be imposed. By denying standing to sue in this case and in *Buckley, supra*, the Fifth Circuit has granted an implied license to industry for the imposition of these mandatory contracts for tied products with the attendant harm to competition. This Court should reverse.

CONCLUSION

In conclusion, it is respectfully urged that this Court consider the extremely wide application of the question presented in this cause as well as the merits of the instant case and reverse the decision of the United States Court of Appeals for the Fifth Circuit in denying standing to Petitioner to seek damages, or, alternatively, injunctive relief against the per se violations of the antitrust laws of the United States complained of in this cause.

Respectfully submitted:

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By: _____
JOSEPH S. PAGLINO, ESQ.

CERTIFICATION

IT IS HEREBY CERTIFIED that three copies of the foregoing were mailed this ____ day of March, 1977 to Darrey A. Davis, Esq., Steel Hector & Davis, 1400 Southeast First National Bank Building, Miami, Florida, counsel for Respondents.

By: _____
JOSEPH S. PAGLINO, ESQ.

APPENDIX

APPENDIX

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APPENDIX 1

United States Court of Appeals,
Fifth Circuit.

No. 76-1847.

BURLEIGH HOUSE CONDOMINIUM, INC., a non profit Florida Corporation, on behalf of itself and its membership, Plaintiff-Appellant,

v.

Herbert BUCHWALD, Individually, and as Trustee, and Burleigh House, Inc., a Florida Corporation for profit, Individually, jointly and severally, Honorable Robert Shevin, as Representative of the State of Florida, Defendants-Appellees.

Jan. 26, 1977.

A condominium association brought action for alleged violations of the Sherman Act. The United States District Court for the Southern District of Florida at Miami, C. Clyde Atkins, J., denied a motion to dismiss. The defendants appealed. The Court of Appeals held that the condominium association lacked standing to sue as a real party in interest under antitrust statutes.

Judgment vacated and case remanded for entry of order of dismissal.

Monopolies—28(1.6)

Condominium association lacked standing to sue as real party in interest under antitrust statutes. Sherman

Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 4, 15 U.S.C.A. § 15.

Appeal from the United States District Court for the Southern District of Florida.

Before GEWIN, GEE and FAY, Circuit Judges.

PER CURIAM:

Appellant, Burleigh House Condominium, Inc., a non-profit Florida condominium association, brought this action on behalf of itself and its membership against the developer, Burleigh House, Inc., and Herbert Buchwald, Trustee of the Burleigh House Condominiums for alleged violations of the Sherman Act, 15 U.S.C. §§ 1 and 2. This cause went to trial and, at the close of the evidence offered by appellant, the district court granted appellee's motion for directed verdict. The condominium association appealed on several grounds but we will not reach those issues. This Court's primary concern is whether or not the condominium association has standing to sue as a real party in interest under 15 U.S.C. § 15. This question was raised by the appellees in their motion to dismiss filed March 4, 1975 which the district court denied.

In a case with remarkably similar facts and issues this court held that a condominium association lacks standing to maintain an action under the antitrust statutes. Buckley Towers Condominium, Inc. v. Buchwald, 533 F.2d 934 (5th Cir. 1976).

Therefore, we vacate the judgment of the trial court and remand for entry of an order of dismissal.

APPENDIX 2

[TITLE OMITTED]

ON PETITION FOR REHEARING

(FEBRUARY 24, 1977)

Before GEWIN, GEE and FAY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

Peter T. Fay

United States Circuit Judge

APPENDIX 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 75-112-Civ-CA

BURLEIGH HOUSE CONDOMINIUM, INC.,
Plaintiff,
vs.
BURLEIGH HOUSE, INC. &
HERBERT BUCHWALD, etc.,
Defendants.

MEMORANDUM OPINION AND ORDER
DISMISSING CAUSE

Filed April 16, 1976

Plaintiff condominium association filed suit on behalf of itself and its members claiming injury to its business or property caused by defendants' alleged violation of the anti-trust laws. The claim was based upon a novel theory of liability and presented this Court with heretofore undecided issues of law. Because the questions raised in this case are of first impression, the Court takes the opportunity to expand the announcement of decision made in directing a verdict for defendants at the close of plaintiff's case.

In 1963 the Florida Legislature authorized a condominium form of ownership of real property. Florida Statutes, Chapter 711. A condominium is created by filing a

Declaration of Condominium which contains details of the condominium including, inter alia, a survey of the land and graphic description of the improvements in which the units are located. The Condominium Act authorizes "any portion of the common elements or common areas or any other property serving the unit owners of a condominium" to be leased. Section 711.63, Fla. Stat.

By means of a booklet containing the condominium documents, which was given to each purchaser at Burleigh House, the developer made full disclosure of the fact and extent of the lease upon the recreational facilities. Each purchaser acquired fee title to his own apartment unit. Each purchaser had an equal ownership share and responsibility for the common elements.[1] Florida Statutes, §711.12. The association's membership consists of all unit owners.

At the close of plaintiff's case, defendants moved for a directed verdict. The Court was also faced with a renewed motion to dismiss the complaint. Since the jurisdictional questions were so intertwined with and related to the merits of the cause, the Court had earlier reserved ruling until plaintiff had an opportunity to present its evidence at trial. The motion to dismiss, as explained below, was meritorious. Technically, this made consideration of the motion for directed verdict superfluous. However, after considering all the evidence in the light and with all reasonable inferences most favorable to the plaintiff, the Court was of the opinion that on the evidence presented, the jury could not arrive at a verdict for plain-

[1]The land or leasehold upon which the improvements are located and any other land or leasehold included in the condominium property whether or not contiguous and all parts of the improvements which are not included within the units. Florida Statutes, §711.06(1)(a)(b).

tiff. Boering Co. v. Shipman, 411 F.2d 365 (5 Cir. 1969); Sulmeyer v. Coco Cola Co., 515 F.2d 835 (5 Cir. 1975).

Plaintiff invoked the jurisdiction of this Court under 15 United States Code, §15 claiming a violation of Section 1 of the Sherman Antitrust Act.[2] Plaintiff did not bear its burden of proving an effect upon interstate commerce in the tied market. Without specific facts proven in support, plaintiff's claim under the alleged tie in arrangement must be dismissed. See, Driskill v. Dallas Cowboys Football Club, Inc., 498 F.2d. 321 (5 Cir. 1974).

Plaintiff attempted to establish the existence of a tying arrangement as first defined by the United States Supreme Court in International Salt Co. v. United States, 332 U.S. 392 (1947), and later defined in Northern Pacific Railway Company v. United States, 356 U.S. 1 (1958).

Although Northern Pacific is commonly cited to the effect that tying arrangements are per se violations of the Sherman Act, the Supreme Court found that tying arrangements violate the Sherman Act only when a "not insubstantial" amount of interstate commerce is affected:

> Whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a not insubstantial amount of interstate commerce is affected. Id., 356 U.S. at 6.

[2]Every contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal.

The United States Court of Appeals for the Fifth Circuit has concisely reiterated the essential elements of an illegal tying arrangement under Northern Pacific, supra.

1. Two separate products, the tying product and the tied product;

2. Sufficient economic power in the tying market to coerce purchase of the tied product;

3. Involvement of a not insubstantial amount of interstate commerce in the tied market; and

4. Anticompetitive effects in the tied market. Driskill v. Dallas Cowboys Football Club, Inc., 498 F.2d 321 (5th Cir. 1974); Coniglio v. Highwood Services, Inc., 495 F.2d 1286 (2d Cir. 1974).

To establish jurisdiction under Section One of the Sherman Act, the plaintiff had to meet one of two tests. Either the activities in question occurred in the course or flow of interstate commerce or the activities complained of, while wholly intrastate in character, had a direct and substantial effect upon interstate commerce. See, e.g. Las Vegas Merchant Merchant Plumbers Assoc. v. U.S., 210 F.2d 732 (9th Cir. 1954); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 235 (1948); Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341, 343 (9th Cir. 1969).

Jurisdiction does not exist merely because the acts complained of affect a business engaged in interstate commerce. Instead, plaintiff had to prove that the acts com-

plained of affect the interstate part of such a business, and that the effect on interstate commerce was substantial in nature. See, David Cabrera, Inc. v. Union de Choferes y Dueons, 256 F.Supp. 839 (D.P.R. 1966), citing Lieberthal v. North Country Homes, Inc., 332 F.2d 269, 272 (2d Cir. 1964); and Atlantic Co. v. Citizens Ice & Cold Storage Co., 278 F.2d 453 (5th Cir. 1949), cert. denied, 339 U.S. 953. If the acts complained of do not involve interstate commerce, either in flow or effect thereon, then the Court is without subject matter jurisdiction because the conduct is outside the sphere of the commerce clause.

In tying cases, jurisdiction must be established by looking only to the interstate aspect of the tied product, if any, in its relevant market. Driskill, supra. Where wholly local restraints, if any, are involved, the effect of such restraints on interstate commerce must be "not insubstantial." Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495 (1969).

In Marston v. Ann Arbor Property Managers Association, 422 F.2d 835 (6th Cir. 1970), cert. denied 399 U.S. 929 (1970), the Sixth Circuit affirmed the district court's holding that the rental of real estate in the Ann Arbor area was "local commerce" and that the competition restrained was local in nature. The effect on interstate commerce of restraints associated with the sale or leasing of real estate was recently examined by the United States Supreme Court in Goldfarb v. Virginia State Bar, 43 L.W. 4727 (1975). The Court pointed out that although land is local in nature, restraints, performed wholly intrastate, connected with its sale had a significant effect in the interstate aspects of the Northern Virginia real estate market. For instance, a significant portion of funds furnished for

the purchasing of homes in Fairfax County came from without the State of Virginia and a significant amount of loans on Fairfax County real estate was guaranteed by the United States Veterans Administration and the Department of Housing and Urban Development, both headquartered in the District of Columbia.

The Court found in Goldfarb that the transactions which created the need for the particular legal services in question were frequently linked with interstate transactions. The Court found that the facts brought the case within the holding of United States v. Frankfort Distilleries, 324 U.S. 293, 297 (1945), that "there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states." Id., at 4727. The Court went on to say that "given the substantial volume of commerce involved, and the inseparability of this particular legal service from the interstate aspects of real estate transactions we conclude that interstate commerce has been sufficiently affected." Goldfarb, supra at 4727.

Although the case before this Court is not one of price fixing as in Goldfarb, there has been no showing that the complained of activity restrained the interstate commerce aspect of the tied market; recreational facilities in the Burleigh House vicinity. The proof offered by plaintiff's expert witness was devoid of competent evidence regarding foreclosure of interstate commerce in the tied market. Plaintiff had alleged injury as a result of defendants' tying recreational facilities[1] to the sale of condominium

[1] rooms and areas within the building

units. The area of the economy allegedly threatened by a breakdown of competitive conditions was, therefore, that of the tied product or the market for recreational facilities in the relevant market area.

Plaintiff's proof was directed at what it termed the "marketing area" or the "relevant market area." This relevant market area was comprised of a primary area — "an area around Burleigh House running north-south about three to four miles and east-west about perhaps a mile and a half;"[4] and a secondary area—"the north is a little bit further north, beyond the three mile limit and a little bit further south."[5]

Thus, at the time of decision, although plaintiff had shown that there were alternative means of recreating available to its members and a large yearly rental fee was charged for the Burleigh House facilities, it had not shown that the effect on the interstate commerce aspects of the tied market, if any, was direct and substantial and not merely inconsequential, remote or fortuitous.

The showing made in Goldfarb of the interstate transactions in the Northern Virginia real estate market is absent here. Accordingly, the instruction of Wickard v. Filburn, 317 U.S. 111, 124 (1942) that in a doubtful case the fact that an activity is of a local character may help to determine whether Congress intended to reach it, became pertinent and helped this Court in reaching its decision.

[4]Plaintiff's expert testified that "[t]his is the logical place or area within which the residents of this Burleigh House could conceivably go to find recreation without unduly traveling."

[5]In establishing the secondary area, the expert witness stated that "in this case we wanted to go further largely to areas in Miami and Miami Beach environment and in Dade County."

Realizing that "[t]here is no bright line dividing cases in which the effect upon interstate commerce is sufficient to permit Congress to prohibit particular anticompetitive activity under the commerce clause from those cases in which it is not sufficient," St. Bernard General Hospital v. Hospital Service Assoc., 510 F.2d 1121 (5 Cir. 1975); Rasmussen v. American Dairy Association, 472 F.2d 517, 526 (9th Cir. 1973), cert denied 412 U.S. 950, the Court examined the facts and found the proof lacking. Therefore, it is

ORDERED AND ADJUDGED that defendants' motions to dismiss and for directed verdict are granted,[6] and plaintiff's motion for relief from judgment is denied.

DONE AND ORDERED at Miami, Florida, this 16th day of April, 1976.

C. Clyde Atkins

United States District Judge

cc: Joseph S. Paglino, Esq.
Darrey A. Davis, Esq.

[6]As an additional ground for granting the motion for directed verdict, the Court finds that plaintiff's claim is time barred. Under Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971), plaintiff alleged a continuing violation of the antitrust laws. However, at trial plaintiff did not show any prohibited behavior after the initial signing of the recreation lease in 1969. Thus the continuing violation theory could not apply. Further, this court notes that after diligent search, it has been unable to find any instance in which the theory was applied to a case involving an illegal tying arrangement.

APPENDIX 4

[TITLE OMITTED]

Filed January 29, 1975

Plaintiff, Burleigh House Condominium, Inc., on behalf of itself and its membership, hereinafter called the association or plaintiff, sues the defendants, Herbert Buchwald, Individually and as Trustee of a Ninety-Nine (99) year lease and Burleigh House, Inc., a Florida Corporation, individually, jointly and severally and says:

1. Plaintiff brings this action on behalf of itself and its membership pursuant to the provisions of 15 U.S.C.A. 15; 28 U.S.C.A. 2201; 15 U.S.C.A. 1-2 and Fla. Stat. 711.12, as amended, and alleges that plaintiff is an entity which is injured in its business or property by reason of defendants violation of 15 U.S.C.A. 1 and 15 U.S.C.A. 2 and that plaintiff has standing to bring this action in its capacity as an injured party and as representative of its membership, pursuant to the above cited authority, and alleges further that the defendants may be found and transact and have transacted business in the Southern District of Florida.

2. That this Court has Jurisdiction of the subject matter of this complaint, pursuant to the provisions of 15 U.S.C.A. 15; 28 U.S.C.A. 2201 and Article I, Sec. 8, Clause 3 of the United States Constitution, in that the effect upon commerce between the several states is direct and/or not insubstantial and that the matter involves sums of money in excess of $240,000—annually.

3. That on or about December 31, 1969, the defendants herein imposed upon plaintiff and its future membership, a ninety nine (99) year lease agreement and recorded same or caused same to be recorded in the official records of Dade County, Florida, along with a declaration of condominium for the Burleigh House Condominium, and ancillary documents, as part and parcel of a scheme, combination and conspiracy between defendants to restrain competition and obtain monies illegally and improperly from the plaintiff herein as a result of such combination, conspiracy and scheme in restraint of trade and commerce, through the device of a tying arrangement, wherein sales of condominium units at the Burleigh House Condominium, would not be permitted to persons from among the several states seeking to become members of Plaintiff unless the said purchasers also purchased an interest in and attorned to the aforesaid ninety-nine (99) year lease contract and that defendants caused to be formed and controlled the plaintiff corporation herein at all times during the formation of the illegal tying arrangements complained of herein, so that plaintiff had no choice or opportunity to resist the actions of defendants herein.

4. That the aforesaid ninety-nine (99) year lease contract served no valid business purpose to the plaintiff or to the defendants and created onerous financial and other obligations far in excess of the reasonable value of the leasehold improvements covered by the aforesaid lease contract and, in fact, served no valid or useful purpose whatsoever and was not a necessary requirement of the sale of condominium units at the condominium development, but served only the illegal purposes of defendants as set forth hereinabove.

5. That, by virtue of and as a direct result of the aforesaid scheme and conspiracy and combination in restraint of trade, the defendants herein sought to and did effectively cause a direct restraint upon the trade and commerce of the several states and did also have a not insubstantial effect upon the commerce of the United States, in that the defendants did entice persons from across the several states to enter into illegal tying arrangements and thereby become obligated under the said 99 year lease, and did make plaintiff liable for the performance of the said illegal leasehold contract as part of the scheme aforesaid.

6. That plaintiff condominium corporation was and continues to be impeded and estopped and precluded from supplying recreational facilities to its membership at a reasonable cost in competition with the tied in recreational facilities imposed upon it on an exclusive basis, at a highly inflated and disproporationate cost, by the defendants, through the device of the aforesaid ninety-nine year lease, in that no alternative facilities were allowed to exist at the condominium project or made available at the creation of the condominium project, and the income and budget of plaintiff association was arranged so that approximately one half (½) of the Condominium's entire operating budget for each year must be used for the payment of the rental on the aforesaid recreation leasehold thereby destroying and impeding competition within plaintiff's area of business so as to adversely affect commerce.

7. That, other than the illegal tying arrangement for the financial benefit of defendants, there was no valid

business purpose in creating a condominium project with a tied recreational lease contract as is present in this instance.

8. That, in addition to the foregoing costs to plaintiff of the nine nine (99) year recreational lease payments, the said lease payments are to be increased under the terms of the leasehold each and every five (5) years pursuant to the Consumer Price Index Increases (All items and food) as set forth from time to time by an agency of the United States Government, so as to make the illegal tying arrangement even more burdensome on plaintiff and estopp plaintiff further from competing with defendants herein.

9. That the defendants were aware of or should have been aware of the illegal tying arrangement at the time of the creation of the said condominium marketing area and the tying of the recreation lease to the said condominium project.

10. That, as a result of the foregoing, the defendants have violated 15 U.S.C.A. 1 and 15 U.S.C.A. 2 and have generally violated the principles and policies as set forth in the Sherman Anti-Trust Act (15 U.S.C.A. 1-2) so as to render the said illegal tying arrangements void or voidable and to entitle plaintiff to damages, injunction and other relief as set forth in said act.

COUNT II

11. That the allegations in paragraphs 1 through 10 are realleged herein.

12. That no purchaser can buy a condominium dwelling unit at the Burleigh House Condominium under existing Florida Law or the Declaration of Condominium and Lease terms which defendants claim to be legally enforceable, unless they agree to pay as a minimum price therefor, to assume a proportionate obligation under the aforesaid ninety-nine (99) year lease, nor can any member of plaintiff corporation sell a dwelling unit to any other person, unless said purchaser agrees to pay, as a minimum price an amount equal to a porportionate share of the aforesaid ninety-nine (99) year leasehold, nor can plaintiff allow such a sale of a condominium unit at the condominium or approve a purchaser pursuant the terms of the Declaration of Condominium and Lease and Florida Law; to wit: Fla. Stat. 711, unless said purchaser agrees to assume the responsibility for payment of an amount equal to a proportionate share of the lease payment of the ninety-nine (99) year lease, as an absolute minimum resale price.

12. That, the foregoing is an illegal price fixing arrangement in violation of 15 U.S.C.A. 1 & 2 and generally violates the principles and policies of the Anti-Trust Acts of the United States (15 U.S.C.A. 1-2).

13. That, as a result of the foregoing, the obligations of the plaintiff and its memberships arising from the aforesaid ninety-nine (99) year lease contract and Declaration of Condominium are void or voidable, illegal and in violation of the Laws of the United States, to wit: 15 U.S.C.A. 1-2 and the general policies of the Anti Trust Acts of the United States, and plaintiff claims that any laws of the State of Florida which seek to compel enforcement of the said illegal lease obligations or give said ob-

ligations the color of law, are in conflict with the Laws of the United States, to wit: 15 U.S.C.A. 1-2 and plaintiff is entitled to relief from enforcement of same by any court of the United States or of the State of Florida.

COUNT III

14. The allegations in paragraphs 1 through 13 are realleged herein.

15. Plaintiff has received demands from defendant Herbert Buchwald, Individually and as Trustee for payment of monies claimed under the terms of the aforesaid ninety-nine (99) year lease and for an increased rental amounting to approximately $240,000.00 per year.

16. Plaintiff claims that the leasehold obligations imposed upon it as aforesaid is an illegal tying arrangement and a per se violation of 15 U.S.C.A. 1-2 and generally violates the principles and practices of the Anti Trust Acts of the United States, so as to make the enforcement of the said leasehold obligation violative of and contrary to the laws of the United States as aforesaid.

17. That plaintiff is involved in an actual controversy within the jurisdiction of this Court and is in doubt as to its rights and obligations under the aforesaid leasehold and ancillary obligations and is in need of a declaration of its rights and other legal relations concerning the leasehold obligation aforesaid herein.

18. That, unless this Court issues a declaration of the rights of the respective parties herein as prayed for, plaintiff will be damaged and continue to be damaged.

19. That, plaintiff is entitled to a Declaratory Judgment pursuant to 28 U.S.C.A. 2201 and Rule 57 of the Federal Rules of Civil Procedure and, further, plaintiff demands a jury trial of all issues so triable as of right in any declaratory judgment proceedings.

WHEREFORE, plaintiff demands the cancellation and rescission of the aforesaid ninety-nine (99) year lease and ancillary obligations, including, but not limited to pledge agreements, legal or equitable obligations of plaintiff or its members or purchasers of members interests in condominium units; a temporary and permanent injunction against the defendants, their successors or assigns, beneficiaries of the trust for whom the defendant, Herbert Buchwald, Individually and Trustee acts, or their successors or assigns, from enforcing any of the terms or conditions of the aforesaid ninety-nine (99) year lease or ancillary obligations thereunder; restitution and recovery of all monies paid by plaintiff or its members herein to the defendants or any of them under the terms of the ninety-nine (99) year lease; an injunction against the State of Florida or any of its subdivisions against enforcement of any portions of Florida State Law which dignify or seek to enforce or legalize obligations arising from the aforesaid ninety-nine (99) year lease or are in conflict with 15 U.S.C.A. 1-2 or the general policies of the Antitrust Acts plus damages and threefold said damages as sustained by the plaintiff and its members, together with costs of this law suit, reasonable attorneys fees and such other relief as this Court Deems fit and proper as to

the allegations of this complaint and further, plaintiff demands trial by jury as to all issues triable as of right by jury and as to all factual issues presented.

BURLEIGH HOUSE CONDOMINIUM, INC.
on behalf of itself and its membership,

By: /s/ Alfred Kaplan, Pres.

Alfred Kaplan, President

Sworn to before me this 27th day of January, 1975.
My Commission expires: July 2, 1978

/s/ Evelyn Friedman

NOTARY PUBLIC

Law Offices of Jos. S. Paglino,
Counsel for plaintiff
88 N.E. 79th Street
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By: /s/ Joseph S. Paglino

Joseph S. Paglino, Esq.